SUPREME COURT, U. S.

DEC 9

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974 No. 74-550

PAAC, AS A COMMISSION AND INDIVIDUALLY, AND MELVIN L. HARDY,
Petitioners,

v.

FRANK L. RIZZO, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JAMES M. PERRY, JR.
Assistant City Solicitor

CLAUDIA KAPUSNIK
Assistant City Solicitor

SHELDON L. ALBERT
City Solicitor

1600 Municipal Services Building
Philadelphia, Pa.
MUnicipal 6-5395

Counsel for Respondents.

MACKENZIE ADAMS, LANE & SMITH, PHILADELPHIA

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Is the Philadelphia Anti-Proverty Action Commission an agency of the City of Philadelphia?

2. Does the Mayor of the City of Philadelphia have the power to remove those municipal officers whom he appoints?

STATUTORY PROVISIONS INVOLVED

PHILADELPHIA HOME RULE CHARTER, Adopted By The Electors April 17, 1951:

> Section 3-207. Members of Boards and Commissions. Except as expressly otherwise provided and subject to the limitations contained in this charter, the Mayor shall appoint the members of all boards and commissions.
>
> Section 3-502. Appointive Offices. A vacancy in an appointive office for a term shall be filled by appointment for the balance of the unexpired term. Such an appointment shall be made in the same manner as an original appointment.

COUNTER-STATEMENT OF THE CASE

Pursuant to the passage of the Economic Opportunity Act, 42 U.S.C.A. 2701 et seq., the Philadelphia Anti-Poverty Action Commission (hereinafter referred to as PAAC or Commission) was created as an agency for the City of Philadelphia for coordinating anti-proverty programs in Philadelphia. The Commission was initially created on February 22, 1965 by an Executive Order signed by the Honorable James H. J. Tate, then Mayor of the City of Philadelphia. As was recognized by the Circuit Court, the Executive Order was issued pursuant to section 3-100(h) of the Philadelphia Home Rule Charter, which provides that the executive and administrative functions of the City shall be performed by ". . . such additional advisory boards as the Mayor may appoint." 502 F.2d at 310, N.7.

Because of the nonpermanent nature of executive orders, the City of Philadelphia and the Office of Economic Opportunity (herein after called OEO) entered into negotiations in order to create PAAC as a permanent entity in accordance with OEO guidelines.

On December 23, 1967, Congress enacted what are known as the Green Amendments to the Economic Opportunity Act of 1964, 42 U.S.C.A. 2790, 2791. The amendments provided for two types of "community action agencies" which would qualify for federal funding. The first type is a state or political subdivision of a state (said subdivision having elected or duly appointed governing officials), or a combination of such political subdivisions, with a program administered by a "community action board." 42 U.S.C.A. § 2790(a), 2791(a). The second type is a public or private non-profit agency or organization which has been designated by a State or such a political subdivision or combination of such subdivisions whose program is administered by a "governing board." 42 U.S.C.A. § 2790(a), 2791(a).

A "governing board" operates independently of political subdivisions with authority to determine major personnel, fiscal and program policies including appointment to senior staff positions. 42 U.S.C.A. § 2791(c). The OEO has set forth parallel powers for community action boards since such powers are not specifically enumerated in the Economic Opportunity Act. With respect to community action boards, local "political officers"[1] have the same powers that governing boards possess, unless the officials delegate those powers to the community action board.

Four days after the passage of the Green Amendments on December 27, 1967, the City of Philadelphia passed Bill No. 2846 as Title 21-800 of the Philadelphia Code.[2] The Ordinance created PAAC as a permanent entity and provided PAAC was "To act as an agency of the City of Philadelphia for any and all of the purposes set forth herein; . . ." Philadelphia Code § 21-800 (5)(g).[3] The Ordinance delineated the powers and duties of PAAC, set out the composition of the Commission and required that "the members of the Commission shall be appointed by the Mayor." Philadelphia Code 21-800(2).[4] The Mayor was given power to appoint the Executive Director and fill any vacancies arising in the Commission. Philadelphia Code 21-800(3,4).[5]

Under the administration of the Honorable James H. J. Tate, former Mayor of the City of Philadelphia, Melvin L. Hardy served as Executive Director of PAAC. During this time period Isaiah W. Crippins served as General

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[1] OEO Community Action Program Memorandum No. 81 at 5, 502 F.2d at 310.

[2] Set forth at 502 F.2d at 310-311.

[3] Set forth at 502 F.2d at 311.

[4] Set forth at 502 F.2d at 310-311.

[5] Partially set forth at 502 F.2d at 311.

Counsel. In January of 1971, the Honorable Frank L. Rizzo succeeded James H. J. Tate as Mayor of Philadelphia.

Pursuant to the authority vested in his office by the Ordinance, the Home Rule Charter, and Pennsylvania law, the Honorable Frank L. Rizzo removed PAAC's Executive Director, Melvin L. Hardy in April, 1973 and made new appointments to the PAAC Board. In addition, the City of Philadelphia refused to renew the contract of Isaiah W. Crippins as PAAC's General Counsel after his contract expired.

Hardy and Crippins refused to give up their positions and filed an action on April 27, 1973 in District Court for the Eastern District of Pennsylvania seeking relief. Four days later the City of Philadelphia sought an injunction in the Court of Common Pleas of Pennsylvania against Hardy and Crippins, seeking to restrain them from interfering with Hardy's successor as Executive Director. On May 3, 1973, the City's action was removed to the District Court. After trial, the District Court concluded that PAAC was an agency of the City of Philadelphia administered by a "'community action board" rather than a nonprofit organization administered by a "governing board."

The Court of Appeals held that it was unnecessary to determine the nature of PAAC in relationship to the Economic Opportunity Act and OEO Guidelines:

> Rather, we are concerned with identifying the basic structure of PAAC. While the Economic Opportunity Act may strongly influence the structure ultimately developed, it is a matter for local governments to decide whether they will create poverty agencies that satisfy federal guidelines. . . . To determine whether the Mayor or PAAC has the authority to remove Melvin Hardy, it is necessary to examine the documents which created PAAC rather than the federal

guidelines which may or may not have been followed. 502 F.2d at 314-315.

The Circuit Court held that PAAC was an agency of the City of Philadelphia, that under the Ordinance the Mayor had authority to appoint the executive director and commission members, and that under Pennsylvania law the power to dismiss flows from the power to appoint. It is from this holding that petitioners seek this Court's review.

REASONS FOR NOT GRANTING THE WRIT

THE MAYOR HAS ABSOLUTE AUTHORITY TO REMOVE OFFICERS FROM OFFICES TO WHICH HE HAS THE POWER OF APPOINTMENT.

PAAC is an agency of the City of Philadelphia. It was first given a temporary existence by an Executive Order, signed by the Mayor of the City of Philadelphia; and later PAAC was established as a permanent entity by way of an Ordinance, passed by City Council. Both the District Court and the Court of Appeals reached this same conclusion after examining the Order, the Ordinance and the facts surrounding PAAC's birth.

In deciding whether or not the Mayor had the authority to remove Melvin Hardy, the Court of Appeals determined that PAAC was a City agency and then looked to local law. Article 6, sec. 7 of the Pennsylvania Constitution states:

> Appointed civil officers, other than judges of the courts or record may be removed at the pleasure of the power by which they shall have been appointed. Set forth at 502 F.2d 315 N.15.

The Court correctly concluded that the Constitution together with the Philadelphia Home Rule Charter provides that the power to remove an appointed official is lodged in the same entity that has the power to appoint. Petition of PAAC, Appendix P.17a.

The Home Rule Charter is entirely consistent with the Constitution on this point. The Charter provides that the Mayor appoints all members of boards and commissions (3-207); and vacancies are filled in the same manner as the original appointment (3-502). Section 9-200 declares that "Any appointed officer may be removed at the pleasure of the appointing power." 502 F.2d 315 N.15.

There is also a line of case decisions stating that under the Pennsylvania Constitution appointed public officers are removable from office at the pleasure of the appointive power. Since petitioner Hardy was appointed by the Mayor, he may be removed by the Mayor. *Rafferty* v. *D'Allesandro,* 309 A.2d 378, 454 Pa. 19 (1973). See also *Naef, Appellant* v. *Allentown,* 227 A.2d 382, 424 Pa. 597 (1967), *Phila.* v. *Sacks,* 210 A.2d 279, 418 Pa. 193 (1965), *Schluruff* v. *Rzymuk,* 208 A.2d 239, 417 Pa. 144 (1965).

The Ordinance establishing PAAC as a permanent agency is consistent with the Home Rule Charter. The Ordinance gives the Mayor the power to appoint the Commission members, the Executive Director and to fill vacancies. From this authority, then, comes the power to remove these appointed officials and fill the vacancies thus created.

In trying to prove that PAAC was not a City agency, petitioners contend that PAAC operated as an autonomous agency. Although the mode of operation of PAAC was irrelevant since the Ordinance creating PAAC set forth the powers at issue here, nevertheless, petitioners failed to prove their contention of autonomous operation. Undisputed testimony demonstrates that the City of Philadelphia issued all checks (N.T. 56) and that PAAC employees had the right to all City of Philadelphia employee benefits, including pension benefits from the City pension fund (N.T. 57-60); all PAAC personnel when hired were processed through the City Personnel Department and were subject to the City's physical examination (N.T. 132). PAAC had to conform to the requirements of the City Charter (N.T. 83); the Mayor was required to approve the plan for PAAC's operations (N.T. 93); and all PAAC contracts were subject to the approval of the City Solicitor. The fiscal and accounting procedures for PAAC required that such procedures be part of those of the City of Philadelphia; purchasing procedures were those of the Procurement Department; and PAAC was fully subject to audits by the City Controller.

The cases cited by petitioners are inapplicable to the present case. Plaintiff's reliance on *King* v. *Smith*, 392 U.S. 309 (1968), *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275 (1958), and *Rochester* v. *Baganz*, 479 F.2d 603 (1973) presumes that the present case is a challenge to federal funding as distributed by PAAC and that local law is being interposed to frustrate federal goals. This is just not the case. PAAC was set up according to federal law and the OEO requirements, and there was never any challenge made to funding in this case. This is simply a suit begun by a disappointed office holder removed from office.

State of Oklahoma v. *United States Civil Service Com.*, 330 U.S. 127 (1946) dealt with a violation of the Hatch Act and is entirely irrelevant. *Robles* v. *El Paso Community Action Ag., Proj. Bravo, Inc.*, 456 F.2d 189 (1972) does not support petitioners' position in that it involved a temporary employee suing a private non-profit community action agency and two of its officers for discharging her. The agency was administered by a governing board which had the power to appoint such personnel. The Court of Appeals affirmed the District Court's dismissal stating that Mrs. Robles failed to state a claim upon which relief could be granted and that she had no statutory right to be employed. None of these cases dealt with the structure of the community action agency itself.

CONCLUSION

Both of the lower courts correctly held that PAAC was an agency of the City of Philadelphia and that the Mayor had the necessary authority to fire Melvin L. Hardy.

This case was correctly decided by the Court of Appeals, and a review of the issues involved herein is not worthy of the full attention of this Court. For these reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

S/ JAMES M. PENNY, JR.

JAMES M. PENNY, JR.
Assistant City Solicitor

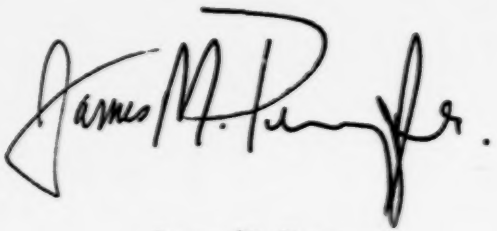
CLAUDIA KAPUSTIN
Assistant City Solicitor

SHELDON L. ALBERT
City Solicitor

Counsel for Respondents.

CERTIFICATE OF SERVICE

I, James M. Penny, Jr., Assistant City Solicitor do hereby certify that five copies of the Brief for Respondents in Opposition to Petition for Writ of Certiorari were served on Donald E. Matusow and S. Gerald Litvin, attorneys for Petitioners, by hand, on the 9th day of December, 1974.



JAMES M. PENNY, JR.
Assistant City Solicitor